RECEIVED
OCT 14 2016
S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

In The South Carolina Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
OCT 14 2016
SC Court of Appeals

Case Number: 2013-CP-23-1833
Appellate Case No. 2013-001645
Op No. 2016-UP-184 (S.C. Ct. App. Filed April 20, 2016)

D&C Builders, Inc...Appellant,

v.

Richard M. Buckley and Wells Fargo National Association, Defendants,
And Richard M. Buckley, Third-Party Plaintiff,
v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley ....Respondent,

PETITION FOR WRIT OF CERTIORARI

Brian A. Martin
S.C. Bar No. 9791
Brian A. Martin, LLC
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
Attorney for Appellant

Other Counsel of Record:

M. Stokely Holder, Esq.
Holder, Padgett, Littlejohn + Prickett, LLC
1204 A East Washington Street
Greenville, South Carolina 29601
Attorney for Respondent

H. Stewart James, Esq.
Babb & Brown, P.C.
505 W. Butler Rd.
Greenville, South Carolina 29607
Co-Counsel for Plaintiff

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
Post Office Box 71727
North Charleston, South Carolina 29415
Attorney for Defendant Wells Fargo

INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case.. 1

Argument

I. Writ of Certiorari should be granted when the Court of Appeals dismisses an appeal that meets the requirements of S.C. Code § 14-3-330(2) as an order affecting substantial rights when the order specifically requires a former client to disclose confidential information as a pre-requisite to disqualifying client's former attorney in direct contradiction of the Rule 1.9 of Rules of Professional Conduct and Comment 3 thereto. 9

Conclusion 21

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 15, 2016.

QUESTIONS PRESENTED

I. Writ of Certiorari should be granted when the Court of Appeals dismisses an appeal that meets the requirements of S.C. Code § 14-3-330(2) as an order affecting substantial rights when the order specifically requires a client to disclose confidential information as a pre-requisite to disqualifying client's former attorney in direct contradiction of Rule 1.9 of Rules of Professional Conduct and Comment 3 thereto.

STATEMENT OF THE CASE

This appeal involves Rule 1.9 of the Rules of Professional Conduct for attorneys, the rights of former clients and the protection of their confidential information in the course of seeking disqualification of a former attorney under Rule 1.9 in a subsequent matter. Although the Rules of Professional Conduct are clear as to the duties owed to a former client and Comment 3 to Rule 1.9 clearly states that a former client cannot be required to disclose confidential information to support disqualification, the Circuit Court in this case determined that it could not rule on disqualification without knowing such information and providing Respondent's counsel the opportunity to refute whether such information was confidential. This Court has never interpreted Rule 1.9 of the Rules of Professional Conduct in light of a Court Order directly contrary to the protections provided former clients under the Rules of Professional Conduct nor has this Court ever interpreted the ethical issue of disqualification in light of the procedural right to choose

one's own counsel. By this petition, Appellant asks this Court to answer these important, novel issues that impact every attorney and client in the State of South Carolina.

The facts of the case are fairly uncomplicated. D&C Builders, LLC ("D&C") served and filed a Notice and Certificate of Mechanic's Lien against Richard M. Buckley ("Buckley") on February 11, 2013 in the amount of $29,389.00. (R. pp. 7-11). D&C then filed an action in Greenville County Court of Common Pleas on April 1, 2013 seeking to foreclose that Mechanic's Lien. (R. pp. 12-19). Buckley retained M. Stokely Holder and the law firm of Kenison, Dudley & Crawford, and LLC, (collectively Kenison Firm") which filed an Answer, Counterclaims and Third-Party claims against Third-Party Defendant Scott Dodenhoff ("Dodenhoff") on May 15, 2013. (R. pp. 25-61). The Kenison firm had only weeks earlier concluded a lengthy representation of D&C and Dodenhoff in a substantially (financially) related matter. (R. p. 380). The Kenison Firm did not consult with D&C to obtain consent prior to undertaking the current representation of Buckley. D&C did not waive the conflict. (R. p. 68, ¶ 29).

Representation of D&C Builders.

D&C is a construction company. Dodenhoff is a licensed contractor, shareholder, director and Vice President with the company. (R. p. 65, ¶ 2). On July 1, 2011, Dodenhoff retained the Kenison Firm to represent D&C with regard to a large outstanding debt owed by a company called TMKG, Inc. for a construction job. (R. p. 65, ¶ 4). Dodenhoff was the sole contact with the Kenison Firm at all times on behalf of D&C. (R. p. 66, ¶ 7).

During the course of the representation of D&C by the Kenison Firm against TMKG, Inc., Dodenhoff provided confidential information to the Kenison Firm regarding

the corporate structure and internal operations of D&C, (R. p. 66, ¶ 9), confidential financial information (R. p. 66, ¶ 11), as well as confidential information regarding his authorization and actions as an agent of the company. (R. p. 66, ¶ 12).

The Kenison Firm engaged in lengthy and extensive actions during its representation of D&C against TMKG, Inc., including filing a Notice and Certificate of Mechanics' Lien on August 8, 2011 in the amount of $74,123.40. (R. pp. 269-270), filing a Lis Pendens, Summons and Complaint to foreclose the mechanics' lien on behalf of D&C (R. p. 256, ¶ 12 – p. 260, ¶ 35) and serving interrogatories and requests for production of documents. (R. pp. 324-332). The Kenison Firm also filed a motion for partial summary judgment on behalf of D&C on September 27, 2011. (R. pp. 278-280).

TMKG, Inc. filed an Answer and Counterclaims on November 22, 2011, denying the allegations of D&C and asserting its own counterclaims against D&C. (R. p. 287, ¶ 12 – p. 288 ¶ 20).

The Kenison Firm filed a Reply to Counterclaims for D&C denying the allegations of the counterclaims and asserting affirmative defenses. (R. pp. 300-310). The Kenison Firm also filed a Motion to Compel Discovery with supporting Exhibits on March 2, 2012. (R. pp. 321-339). On March 5, 2012, TMKG, Inc. filed a Petition to Vacate Mechanic's Lien and its own Motion for Partial Summary Judgment. (R. pp. 340-345).

A hearing was held on the cross motions for summary judgment on April 19, 2012. (R. p. 355). An Affidavit of Scott Dodenhoff with supporting Exhibits was prepared by the Kenison Firm and filed on April 19, 2012. (R. pp. 358-359). Following the hearing, an Order was entered on May 3, 2012 denying both motions for summary

judgment. (R. p. 378-379). Subsequent to the denial of summary judgment, the parties engaged in extensive negotiations between April and July 2012 ultimately resulting in a settlement. (R. p. 67, ¶ 15). A Stipulation of Dismissal was filed on July 20, 2012. (R. p. 380).

Representation of Buckley.

On January 4, 2012, Buckley and D&C entered into an agreement for D&C to renovate Buckley's home located at 105 Cammer Ave. in Greenville (the "Buckley Project"). (R. p. 67, ¶ 14).

Construction on the Buckley Project began on February 5, 2012, two months prior to the TMKG summary judgment hearing, (R. p. 67, ¶ 15), construction continued through the summer and the Certificate of Occupancy for the Buckley Project was issued on July 31, 2012. (R. p. 67, ¶ 16), just days after the dismissal of the TMKG matter.

Upon the completion of the project, Buckley refused to pay the remaining balance due to D&C for the renovations. (R. p. 67, ¶ 18). D&C filed a Notice and Certificate of Mechanics' Lien to preserve its rights and then filed the current action to foreclose that Mechanics Lien. (R. p. 16, ¶ 4).

Buckley then hired the Kenison Firm to defend the foreclosure action brought by D&C. (R. p. 112, ¶ 7). On behalf of Defendant Buckley, the Kenison Firm filed an Answer, Counterclaims and Third-Party Claims against Dodenhoff individually. This Answer asserts fourteen (14) affirmative defenses, and although numbered differently, thirteen (13) of those defenses asserted in the Buckley Answer against D&C were defenses also asserted by the Kenison Firm on behalf of D&C in the Reply to the counterclaims in the TMKG, Inc. case. (Compare R. pp. 28-33 with R. pp. 306-309).

The Kenison Firm emphasized the conflict present based on prior information received in alleging that its former client **(1) "did not have a functioning corporate structure, was incapable of making independent decisions, and did not follow the corporate formalities applicable to a South Carolina corporation at all pertinent times herein,"** (R. p. 50, ¶ 116); **(2) "was insolvent prior to and/or during construction of the Project"** (R. p. 51, ¶ 117); and **(3) "was grossly undercapitalized prior to and during construction of the Project."** (R. p. 51, ¶ 118; R. p. 67, ¶ 20). Additionally, the **Kenison Firm asserted Third-Party claims against Dodenhoff**, the corporate representative for D&C, individually, that he **(1) treated debts and assets of D&C as his own personal debts** (R. p. 51, ¶ 120); **(2) dominated the finances, policies and business practices of D&C such that it was operated as a façade for his own personal operations** (R. p. 51, ¶ 121); and **(3) used his control of D&C to commit fraud against Buckley.** (R. p. 51, ¶ 122 – p. 52, ¶ 125; p.29, ¶131 – p.32, ¶148; R. p. 67, ¶ 20). **The Kenison Firm also alleged that D&C and Dodenhoff breached fiduciary duties by not properly maintaining, accounting, paying or applying funds paid to them in trust.** (R. p. 59, ¶ 162).

In addition to the filing of the Answer, Counterclaims and Third-Party Claims, the Kenison Firm also served interrogatories and requests to produce on D&C seeking information as to the corporate structure (R. p. 191, ¶ 16; p. 192, ¶ 18 ; p. 196, ¶ 17; p. 197, ¶18, 20), financial status (R. p. 190, ¶ 13 – p. 192, ¶ 20, p. 197, ¶ 18, 19) and information related to all jobs since January 1, 2011 (R. p. 192, ¶ 22), <u>which would necessarily include all of the TMKG records</u>. (R. p. 68, ¶ 21, 22). The Kenison Firm also served Requests to Admit requesting D&C and Dodenhoff to admit that they do not

maintain proper accounting records or appropriate tax records. (R. p. 198, ¶ 2; p. 199, ¶ 4-8; p. 68, ¶ 23).

Conflict of Interest.

Based upon the allegations asserted by the Kenison Firm on behalf of Buckley, D&C believed that confidential information obtained by the Kenison Firm in its representation of D&C against TMKG, Inc. was being used, or was very likely to be used, against D&C in the furtherance of the defenses and counterclaims of Buckley in this matter. (R. p. 68, ¶ 27, 28).

Prior to undertaking the representation of Buckley in this matter, the Kenison Firm was aware that it had previously represented D&C in a prior mechanics' lien and foreclosure action against TMKG, Inc. (R. p. 111, ¶ 3). The Kenison Firm was also made aware of the conflict by Counsel for D&C prior to the filing of the Motion to Disqualify. (R. p. 140, lines 4-12).

With no further action by the Kenison Firm, a Motion to Disqualify Attorney and Law Firm with supporting Affidavit was filed by D&C on June 19, 2013. (R. pp. 62-64). A hearing on the Motion to Disqualify was also held on July 8, 2013 before the Honorable Edward Miller. (R. pp. 130-155).

At the hearing on the Motion to Disqualify, D&C presented the information referenced above and argued that the TMKG case and the Buckley case were "substantially related" under Rule 1.9 of the Rules of Professional Conduct and the representation of Buckley was prohibited. (R. p. 137, line 12 – p. 138, line 3). The Kenison Firm challenged the Motion to Disqualify on the basis that the facts of the Buckley case and the TMKG case are not "substantially related" and are "totally

opposite," (R. p. 145, ll. 2-3), that they were unaware of any specific confidential matter at issue in the Buckley case, (R. p. 145, ll. 19-20), and they have not been provided any specific alleged confidential information that could potentially create a conflict. (R. p. 146, line 22 – p. 147, line 2). In support of these assertions, Attorneys Holder, Johnson and Crawford all state in their respective affidavits that they are "unaware of" or "do not remember" any confidential information provided by D&C to them in connection with their prior representation against TMKG, Inc. (R. p. 114, ¶ 13; p. 117, ¶ 4; p. 120, ¶ 4).

The Circuit Court requested D&C provide the specific information it contended the Kenison Firm learned in its representation in the TMKG case that would be injurious to D&C in the current case. (R. p. 150, lines 19-22). D&C argued that such specific disclosure was prohibited by the ethical rule and was unnecessary given the cases were "substantially related." D&C also objected to disclosing such information due to the client confidentiality. (R. p. 150, line 23 – p. 153, line 9). Despite the information presented to the Court, an Order was filed on July 16, 2013 requiring D&C to submit a privilege log to the Court, Buckley and to the Kenison Firm to support its Motion to Disqualify "containing the specific information and knowledge it contends that KDC acquired through its prior representation of Plaintiff which will injuriously affect Plaintiff in this 2013 Action." (R. p. 5, ¶ 4). The Court found that it could not rule on the Motion to Disqualify without this information, therefore, the Motion to Disqualify was held in abeyance by the Court pending receipt of this information. (R. p. 6, ¶ 3).

On July 16, 2013, D&C filed a Motion to Reconsider, Clarify and Amend Order to Issue Injunction with supporting Exhibits as to the Court Order of July 16, 2013. (R. pp. 156-160). On July 18, 2013, the Kenison Firm responded to the Motion to

Reconsider by letter to the Court specifically stating unequivocally that **"no confidential information was gained by my firm in its prior representation of Plaintiff."** (R. p. 246, lines 27-29). The letter further states that **"The Plaintiff has failed to provide any "specific" confidential facts to counter this position."** (R. p. 246, lines 31-33).

A hearing was held on the Motion to Reconsider, Clarify and Amend Order to Issue Injunction on July 23, 2013 before the Honorable Edward W. Miller. (R. pp. 175-183). During the hearing, the Circuit Court expressed that it would not disqualify a law firm without some kind of basis (R. p. 178, lines 19-22), that if the Kenison Firm has confidential privileged information, they needed to have the opportunity to respond and explain whether it is or isn't privileged (R. p. 178 line 23 – p. 179, line 3).

An Order denying the Motion to Reconsider, Clarify and Amend Order to Issue Injunction was filed on July 25, 2013. (R. pp. 1-2). D&C timely filed its Notice of Appeal on July 26, 2013. (R. pp. 248-249).

Considering the Order of the Circuit Court was directly contrary to Rule 1.9 of Rules of Professional Conduct and shifted the burden of proof regarding disqualification onto the former client, D&C appealed the trial court's Order in expectation that the Court of Appeals would provide much needed guidance on these important questions affecting all attorneys and clients throughout South Carolina. The Court of Appeals, however, ignored the ethical conflict and simply examined the situation from a strictly procedural point of view, finding the Circuit Court order was similar to a discovery order that was not appealable and dismissed the appeal without consideration to the substantial rights of the clients affected by the Order.

ARGUMENT

I. Writ of Certiorari should be granted when the Court of Appeals dismisses an appeal that meets the requirements of S.C. Code § 14-3-330(2) as an order affecting substantial rights when the order specifically requires a client to disclose confidential information as a pre-requisite to disqualifying client's former attorney in direct contradiction of Rule 1.9 of Rules of Professional Conduct and Comment 3 thereto.

In its Unpublished Opinion No. 2016-UP-184, this Court dismissed the appeal of the trial court's order requiring Appellant to provide specific confidential information as a pre-requisite to its Motion to Disqualify Respondent's Counsel in direct contradiction of Rule 1.9 of the South Carolina Rules of Professional Conduct and Comment 3 thereto based on a finding that the order was not immediately appealable. The Court's Opinion was based on a determination that the order appealed does not involve the issuance or denial of an injunction as defined in Black's Law Dictionary, and therefore meets no provision of South Carolina Code Section 14-3-330. The Court further found that the trial court's order was more like a discovery order, which is generally not appealable.

In comparing the trial court's order to a discovery order, the Court viewed this case from a strictly procedural viewpoint. However, this trial court's order is directly contrary to the requirements of the Rules of Professional Conduct related to the situation presented and therefore makes it an ethical issue rather than a procedural issue. It is the ethical issue presented, **and** the substantial rights affected by the order and its precedent that make the trial court's order immediately appealable pursuant to S.C. Code Section 14-3-330(2).

Disqualification is an ethical issue, not a procedural issue. See State of Arkansas v. Dean Foods Products Company, Inc., 605 F.2d 380, 384 (8th Cir. 1979)(citing

American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1127 (5th Cir. 1971)). The order of the trial court requires the disclosure of confidential client information as a requirement to support disqualification which is directly contrary to the ethical requirements of Rule 1.9 and Comment 3 thereto of the Rules of Professional Conduct.

In its unpublished opinion, the Appellate Court found that the appeal did not involve the issuance or denial of an injunction pursuant to South Carolina Code §14-3-330(4), however, the opinion does not address appellate jurisdiction under South Carolina Code §14-3-330(2) as the appeal of an order affecting a substantial right.

The Court makes reference in the unpublished opinion that even if the trial court's order could be construed as denying the motion to disqualify, Enersys Delaware, Inc. v. Hopkins, 401 S.C. 615, 738 S.E.2d (2013) dictates that such denial is not immediately appealable. However, the trial court's order does not deny the motion to disqualify; the trial court ***refused to consider*** the motion to disqualify without the disclosure of the specific confidential information. This situation is completely different from both Enersys and the opposite holding in Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005) that an order granting a motion to disqualify is immediately appealable under S.C. Code § 14-3-330(2) as it does affect a substantial right. Neither holding is directly applicable in the present case which presents an issue of first impression for this Court, namely, does an order to disclose confidential information as a pre-requisite to disqualification, contrary to the Rules of Professional Conduct, affect a substantial right supporting appeal of that order?

In Enersys, the Court recognized that the trial Court used the appropriate "substantially related" assessment of both representations as the basis for denying disqualification, stating

> **The circuit court denied the motion [to disqualify] concluding that Harper's previous assistance in developing Enersys' litigation strategy was insufficient grounds upon which to disqualify him due to the *dissimilarities* of his previous representations and the current suit. (Emphasis added).**

Id. at 615, S.E.2d at 479. Harper had previously represented Enersys in five employment related lawsuits seven (7) to nine (9) years before the alleged conflicting representation as compared to the breach of contract action Harper was pursuing against Enersys on behalf of Hopkins. Id. at 615, S.E.2d at 478-479. In the present case, however, the time between representations by Respondent's attorneys was just a few months.

In Hagood, the trial Court used Rule 3.7 of the Rules of Professional Conduct which prohibits an attorney from representing a client when the attorney will be a witness in the proceeding to disqualify an attorney where a full-time employee of the attorney would be a witness rather than the attorney.

> **The circuit court concluded it would be improper under the Rules of Professional Conduct for an investigator or accident reconstruction expert who works as a full-time employee for Petitioner's Attorney to testify on Petitioner's behalf at trial.**

Id. at S.E.2d 710. The Court analyzed the matter as a case of first impression just like the present case, and found that disqualifying a party's attorney affects a substantial right and may be immediately appealed under Section 14-3-330(2). Id. The Court went on to hold specifically

> **The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship**

> **and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.**

Id. Finally, the Court stated, "Deprivation of the right to ones preferred attorney **would affect the attorney-client relationship, which is extremely important in our adversarial system.**" Id. (emphasis added).

In Enersys, the only substantial right examined in that case was the refusal to disqualify an attorney. Specific substantial rights Appellant contends are affected is the right to maintain confidential information relayed through confidential attorney-client communications and the right not to be forced to disclose such communications in order to support disqualification. Such forced disclosure of confidential information from a client must certainly be viewed equally if not more substantial than those examined by the Court in Hagood in that such an order will significantly impact the attorney-client relationship and overall litigation, from which no appeal could undo.

In preserving client confidences, a lawyer serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. (Preamble ¶8, RPC, Rule 407, SCACR & Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR). Rule 1.6(a) more specifically addresses this concept by requiring that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Rule 1.6(a), RPC, Rule 407, SCACR. "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR. **"Confidentiality contributes to the trust that is the hallmark of the client-lawyer**

relationship." Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR. In this regard, it must be construed that the confidential nature of the attorney-client relationship constitutes a substantial right under S.C. Code §14-3-330(2).

Rule 1.9(a) recognizes the continuation of the confidentiality obligation once representation is terminated by the mandate that:

> **A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same *or substantially related matter in which that person's interests are materially adverse to the interests of the former client* unless the former client gives informed consent, confirmed in writing.**

Rule 1.9(a), RPC, Rule 407, SCACR (Emphasis added). Rule 1.9(c) offers further protection by prohibiting a lawyer from using any information to the disadvantage of a former client. Rule 1.9(c)(1), RPC, Rule 407, SCACR.

As referenced in Appellant's argument above, the trial court's order that Appellant provide specific confidential information directly overrides the mandate to protect a client's confidential information. Comment 3 to Rule 1.9 confirms this where it clearly states:

> **A former client *is not required* to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.**

Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR (Emphasis added).

The order of the trial court is directly at odds with the ethical rule therefore making this an ethical issue for this Court to review. The trial court's order requires Appellant to reveal specific confidential information to prove the Respondent's attorneys have such information to thereby justify disqualification. The trial court specifically stated, "I'm not going to automatically disqualify a law firm from representation. If you

want me to do something of that significant of nature, then there has to be some kind of basis." (R p. 178, ll. 19-22).

As argued to the trial court, the "basis" for disqualification under Rule 1.9 is whether the prior and current cases are "substantially related." (R p. 179, l. 18 – p. 180, l. 4). The "substantially related" analysis is the only way to protect the confidential nature of attorney-client relationships in this type of situation. The rule was written this way on purpose and the Comments to the Rule further bear this out.

The significance of the confidentiality associated with the attorney-client relationship is demonstrated by the weight of existing legal authority addressing this same situation. Courts in other jurisdictions unanimously agree that confidential information must be protected, particularly in disqualification situations. The most similar case to the present matter is the case of Foulke v. Knuck, 784 P.2d 723, 162 Ariz. 517 (Ariz.App.Div. 2 1989). In Foulke, the attorney to be disqualified made the exact same claims as the Respondent's attorneys that no confidential information had been obtained except what is now publicly known. In response the Court stated that this:

> **...contention fails to recognize the mandatory nature of ER 1.9(a). The rule does not require that confidences and secrets be divulged in order for a conflict to exist or for disqualification to be proper. State v. Allen, 539 So.2d 1232, 1234-35, (La. 1989); see also Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383 (8th Cir. 1979); United States v. Kitchin, 592 F.2d 900, 904 (5th Cir.), cert. denied, 444 U.S.843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979). Regardless of what was communicated during the representation of the former client, the rule prohibits subsequent representation of an individual whose interests are substantially adverse to those of the former client.**

Id. at 522, P.2d at 728. (citing T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265. 268-69 (S.D.N.Y. 1953)). The Court elaborated by holding:

> **The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his**

adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. *The Court will assume that during the course of the former representation confidences were disclosed to the attorney* bearing on the subject matter of the representation. It will not inquire into their nature and extent. *Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.*

Foulke at 522, P.2d at 728 (emphasis added). See also Cord v. Smith, 338 F.2d 516, 524-25, (9th Cir. 1964); Matter of Evans, 113 Ariz. 458, 462, 556 P.2d 792, 796 (1976).

The Washington Court of Appeals analyzed existing cases on the issue and stated:

The plain language of RPC 1.9 indicates *actual proof of disclosure of confidential information is not necessary* if the matters are substantially related. The weight of authority from other jurisdictions similarly interprets the rule as not requiring proof of disclosure of confidential information.

Teja v. Saran, 68 Wn.App. 793, 846 P.2d 1375 (Wash.App. Div. 1 1993)(emphasis added)(citing Foulke v. Knuck, 162 Ariz. 517, 522, 784 P.2d 723, 728 (1989); Brent v. Smathers, 529 So.2d 1267 (Fla.Dist.Ct.App. 1988); United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp., 637 F.Supp. 1556 (W.D.Wash. 1986); Junger Util. & Paving Co. v. Myers, 578 So.2d 1117 (Fla.Dist.Ct.App. 1989); Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582, 584 (1990); Oxford Dev. Minn., Inc. v. Ramsey, 428 N.W.2d 434 (Minn.Ct.App. 1988); Reading Anthracite Co. v. Lehigh Coal & Nav. Co., 771 F.Supp. 113 (E.D.Pa. 1991); Green v. Montgomery Cy., Ala., 784 F.Supp. 841 (M.D.Ala. 1992).

North Carolina follows this rationale as well. Under Cannon 4 that requires an attorney to preserve the Confidences and Secrets of a client, EC4-4 states:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical

precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge....

Lowder v. All Star Mills, Inc., 60 N.C.App. 275, 280, 300 S.E.2d 230, 233 (N.C.App. 1983). Interpreting this Cannon, the Lowder Court further held:

It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege.

Id. at 282, S.E.2d at 234.

The Court in Arkansas v. Dean Foods summed it up best when it stated:

To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule (protecting client confidences).

Dean Foods, 605 F.2d at 383.

The attorney-client relationship, both current and former, are of such importance that maintaining confidentiality and obligations to all clients is necessary for clients to trust their attorneys not to reveal confidential information and to never use information they obtained from the client against that client. When an attorney chooses to change sides and represent someone against a former client, the interests of justice are not served when the attorney can simply claim he doesn't remember anything confidential or when the trial court can require disclosure of such confidential information as proof from the client. Such a requirement on the former client defeats the very purpose of the ethical rules and violates the protection of confidentiality upon which all clients rely in their relationship with attorneys.

Further proof of the importance of maintaining the confidential nature of attorney-client communication is the manner in which Rule 1.9 requires the Court to assess disqualification based on cases being "substantially related." Comment 3 provides in no uncertain terms:

> **Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or <u>if there otherwise is a *substantial risk* that confidential factual information *as would normally* have been obtained in the prior representation would materially advance the client's position in the subsequent matter.</u>**

Rule 1.9 Cmmt. 3, RPC, Rule 407, SCACR (Emphasis added).

There is no better example than the facts of the present situation. Both the prior case where Respondent's attorneys represented Appellant and the present case representing Respondent both involve the collection and accounting of money. Respondent's attorneys obtained financial information from Appellant in the prior case and then turned around in the present case and alleged Appellant was **"insolvent prior to and/or during construction of the Project"** (R. p.51, ¶117) and **"grossly undercapitalized prior to and during construction of the Project."** (R. p. 51, ¶118, R. p. 67, ¶20). Remember, these statements are being made by the same attorneys representing Appellant ***<u>while</u>*** it was allegedly "insolvent" and "undercapitalized!" Clearly, the allegation alone against a client you were representing at the time would indicate a conflict exists.

The ability to trust in the confidential nature of attorney-client communications is most certainly a substantial right which will be significantly impacted if the trial court is able to order Appellant to disclose confidential attorney-client communications as a requirement to support disqualification of Respondent's Attorneys. Such an order is in

direct violation of the Rules of Professional Conduct, but is also contrary to the Supreme Court's holding in Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996) and the overwhelming authority from other jurisdictions.

The Supreme Court confirmed that examining a potential conflict prospectively is the test in holding in Townsend the standard for "substantially related" is:

> **...whether the affected lawyer "*would have or reasonably could have learned* confidential information in the first representation that would be of significance in the second."**

Id. at 315, S.E.2d at 429 (citing Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.9:104, at 293 (1996)(emphasis added)). In finding disqualification was warranted, the Supreme Court held:

> **Here, although he claims none of the same information was actually used in the two matters, *Lawyer should have recognized the risk* that information he gained during the custody matter in which he was the Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father.**

Id. at 317, S.E.2d at 429(emphasis added).

Given the standard and test set in Townsend, it cannot be protecting the client's interest or serving the interests of justice and the public's perception of how justice is served to require the client to prove it shared confidential information with its former attorneys.

If "confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship" (Rule 1.6 Cmmt. 2, RPC, Rule 407, SCACR), then this Court must protect that confidentiality, the sanctity of confidential attorney-client communications, and the fair administration of justice. If the disclosure of confidential information can be ordered

to prove disqualification, the whole foundation of client protection crumbles. The Rules of Professional Conduct are designed to assure the protection of client confidences and the necessary confidential nature of the attorney-client relationship cannot simply be ignored in favor of an attorney that claims no such knowledge was obtained or exists.

In Hagood, the Court examined the impact of granting disqualification has on a client's right to choose their own attorney and determined the right to choose one's own attorney was a substantial right affected to grant appellate jurisdiction under S.C. Code § 14-3-330(2). Id. at S.E.2d 710. If the right to choose one's attorney is considered a substantial right to grant jurisdiction, then the superior right to the fair administration of justice must also be a substantial right conveying appellate jurisdiction.

"This court has a duty to maintain the highest ethical standards of professional conduct to insure and preserve trust in the integrity of the bar." H&C Corporation, Inc. v. Puka, No. 4:12-cv-00013-RBH , Lawyers Weekly No. 002-175-13, 4 pp. (R. Bryan Harwell, J.)(D.S.C. October 11, 2013). Citing Donaldson v. City of Walterboro Police Dept., No. 2:06-cv-02492-PMD, 2008 WL 906707 (D.S.C. March 31, 2008), The Puka Court, went on to hold:

> **As noted by Judge Duffy in Donaldson, "the court acknowledges that granting this Motion to Disqualify deprives the Plaintiff of his chosen counsel and increases the length of time this case will remain pending. *However, the court is mindful of its responsibility to uphold the South Carolina Rules of Professional Conduct...*"**

Puka, at p. 4 (citing Donaldson 2008 WL at *4)(emphasis added).

The trial court weighed the equities in Appellant's right to keep the information confidential with Respondent's right to have the attorney of his choosing. (R. p. 178, l. 9 – p. 179, l. 12, p. 180, ll. 17 – 21, p. 181, ll. 14-24). But contrary to Puka decision, the

trial court erroneously believed that the right to choose one's counsel was superior to the right to maintain confidential information in a disqualification matter and the right to the fair administration of justice. (R. p. 180, ll. 17 – 21).

Dismissal of this appeal creates manifest uncertainty for attorneys as to the priority of the Rules of Professional Conduct when in conflict with an order of the trial court. The order of the trial court in this case requires Appellant to provide confidential information as a requirement to support disqualification of Respondent's attorneys contrary to Rule 1.9 and Comment 3 thereto. The holdings of Enersys and Hagood use different standards to determine whether a substantial right is affected, but neither deal with the present situation where the trial court **refused to consider** disqualification without disclosure of the alleged confidential information.

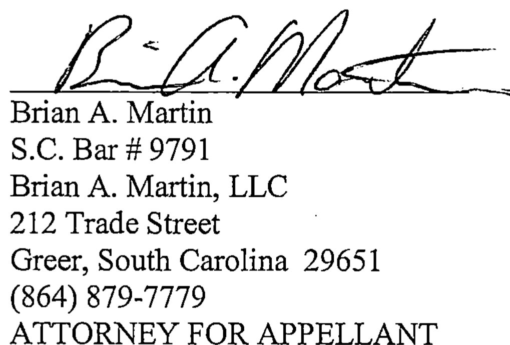
If a trial court is able to issue orders directly contrary to the Rules of Professional Conduct, an attorney cannot know whether to follow the order of the trial court or follow the Rules of Professional Conduct. Great peril exists down either path. The Court of Appeals failed to address whether the order requiring disclosure of confidential information to support disqualification affects a substantial right and is therefore appealable pursuant to South Carolina Code §14-3-330(2).

CONCLUSION

Because of the significant impact of this decision, as well as and most especially the confusion and uncertainty the decision will inject into the legal profession, and for the above-stated reasons and authorities, D&C Builders respectfully petitions this Court to grant a Writ of Certiorari to review the decision of the Court of Appeals in this case, allow the appeal to proceed pursuant to S.C. Code Section 14-30-330(2) as the appeal of an Order affecting substantial rights, and provide clarification as to the protections afforded former clients under Rule 1.9 of the Rules of Professional Conduct in light of an Order requiring the disclosure of confidential information as a requirement for disqualification of a former attorney.

Respectfully submitted,

October 14, 2016



Brian A. Martin
S.C. Bar # 9791
Brian A. Martin, LLC
212 Trade Street
Greer, South Carolina 29651
(864) 879-7779
ATTORNEY FOR APPELLANT

BRIAN A. MARTIN, LLC
ATTORNEYS AT LAW

RECEIVED
OCT 14 2016
SC Court of Appeals

October 14, 2016

Honorable Daniel E. Shearouse
South Carolina Supreme Court
Supreme Court Building, 1231 Gervais Street
P.O. Box 11330
Columbia, South Carolina 29211-1330

Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
Greenville County Case #: 2013-CP-23-1833
Appellate Case No. 2023-001645

Dear Mr. Shearouse:

Enclosed please find herewith for filing with the Court the original and seven (7) copies of a Petition for Writ of Certiorari, one (1) unbound and two (2) bound copies of the Appendix, the original and two (2) copies each of Proof of Service for the Petition and for the Appendix in the above-referenced matter. Also enclosed please find my firm's check in the amount of $100.00 for filing same. I would appreciate your filing the originals and returning a clocked copy of each to me by the individual delivering same. By copy of this letter I am serving same on opposing counsel.

Thank you in advance for your assistance. Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

Brian A. Martin

Enclosures

cc: Jenny A. Kitchings, Court of Appeals
M. Stokely Holder, Esquire
H. Stewart James, Esquire
Thomas A. Shook, Esquire

BRIAN A. MARTIN° • PATRICK O. DOLLAR^* • CURTIS S. BAGWELL, II^
LICENSED IN SC^, NC° & GA* • 212 TRADE STREET • GREER, SC 29651 • TEL (864) 879-7779 • FAX (864) 879-7171
BRIAN@MARTINLAWSC.COM • PATRICK@MARTINLAWSC.COM • CURT@MARTINLAWSC.COM